Supreme Court, U.S.
FILED
JUL 20 1990
JOSEPH F. SPANIOL, JR.

No. 89-1828

In the Supreme Court of the United States

OCTOBER TERM, 1990

TIMMY DALE GILTNER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the United States was not liable under the Federal Tort Claims Act for injuries suffered by an employee of a subcontractor working on a government facility because, under Louisiana's workers' compensation law, the United States was a "statutory employer" of the injured worker.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A6-A12) is unpublished, but the decision is noted at 894 F.2d 1334 (Table). The opinions of the district court (Pet. App. A1-A5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1990. The petition for a writ of certiorari was filed on April 25, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In this suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680, petitioners seek damages from

the United States for injuries that petitioner Timmy Dale Giltner sustained while working at the Weeks Island Strategic Oil Reserve in New Iberia, Louisiana. The Weeks Island facility is owned by the United States for use as an emergency oil reserve. The United States contracted with Boeing Petroleum Service for the operation and maintenance of the facility. Boeing subcontracted with Hobart Corporation to perform work on wire mesh at the facility. Hobart, in turn, subcontracted with Premier Construction, Inc. to provide manual labor for the job. Giltner was employed by Premier. Pet. App. A7.

Giltner was seriously injured when he tripped on a piece of sheet iron and fell while working in one of the facility's underground caverns. Giltner and his wife, petitioner Lori Giltner, brought this action against the United States under the FTCA, alleging that his injuries were attributable to the government's negligent maintenance of the Weeks Island facility. Pet. App. A7-A8.

2. The government moved for summary judgment, arguing that under Louisiana's workers' compensation law the United States was Giltner's "statutory employer" and, consequently, was not liable in tort for his injuries.[1] The district court initially denied the motion, finding that there were disputed issues of fact material to the question

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[1] Under Louisiana's workers' compensation law, workers' compensation benefits are an injured worker's exclusive remedy against his employer. When a principal contracts with an independent contractor for the performance of work that is part of the principal's business, the principal is—under circumstances discussed further below—deemed an employer of the contractor's employees. La. Rev. Stat. Ann. § 23:1061 (West 1985 & Supp. 1990). See Pet. App. A8-A12, A18-A21. (As noted below, the amendment to the statute enacted in 1989 is not effective with respect to this case.)

The defense that these provisions afford to a principal is commonly referred to as the "statutory employer defense."

whether the United States was Giltner's statutory employer. Pet. App. A1-A3. However, upon reconsideration, the district court granted the motion. Referring to Fifth Circuit decisions applying the statutory employer defense in FTCA cases, the district court held that "the United States [was] clearly entitled to" that defense on the facts of this case. *Id.* at A4.

3. In an unpublished decision, the court of appeals affirmed. Pet. App. A6-A12. The court noted that the FTCA "permits recovery in tort against the United States only 'under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.' " *Id.* at A8 (quoting 28 U.S.C. 1346(b)). Under Louisiana law, the court continued, "the proper test for determining whether the government qualifies as a statutory employer is whether the plaintiff was injured while doing work that was part of the 'trade, business, or occupation' of the government." Pet. App. A9 (citing *Thomas* v. *Calavar Corp.*, 679 F.2d 416, 418-419 (5th Cir. 1982)). Although it recognized that the Louisiana Supreme Court had "narrowed the category of statutory employers" in *Berry* v. *Holston Well Service, Inc.*, 488 So. 2d 934 (La. 1986), the court of appeals adhered to prior Fifth Circuit decisions holding that the *Berry* test was inapplicable as a matter of state law to governmental entities. Pet. App. A9-A10 (citing *Hebert* v. *United States*, 860 F.2d 607, 608 (5th Cir. 1986) (per curiam); *Leigh* v. *NASA*, 860 F.2d 652, 653 (5th Cir. 1988)). Finding that the district court had properly applied those precedents to this case, the court of appeals affirmed. Pet. App. A11-A12.

ARGUMENT

This is the most recent in a series of cases in which the Fifth Circuit has concluded that Louisiana's statutory em-

ployer defense bars an FTCA action against the United States by an individual injured while working for a government contractor on a government project. See *Hebert* v. *United States, supra*; *Leigh* v. *NASA, supra*; *Chaline* v. *United States*, 887 F.2d 505 (1989), cert. denied, 110 S. Ct. 1115 (1990). In each of these cases, the court of appeals has held that the United States' liability should be determined by reference to state-law standards governing the availability of the statutory employer defense to governmental entities. Last Term, in *Chaline*, this Court denied a petition for certiorari seeking review of the question whether the United States' liability should instead be judged by reference to the standard for private employers. The petition in this case presents the same question. For reasons similar to those we advanced in *Chaline*, further review is unwarranted.

1. Before the *Berry* decision, a single standard governed the availability of the statutory employer defense to both private and governmental entities in Louisiana. In cases in which an employee of a contractor was injured while working on a public or private project, the issue was whether the worker "was injured while doing work that is part of the 'trade, business, or occupation' " of the principal. *Thomas* v. *Calavar*, 679 F.2d at 419. See *Klohn* v. *Louisiana Power & Light*, 406 So. 2d 577 (La. 1981). However, in *Berry*, a case brought by an injured worker against a private principal, the Supreme Court of Louisiana announced a "three level analysis" governing the availability of the statutory employer defense. 488 So. 2d at 937. The "central question" under *Berry* is "whether the contract work is specialized or non-specialized." If the work is specialized, the statutory employer defense is unavailable to the principal; if not, the availability of the defense depends on whether the contract work "can be considered a part of the principal's trade, business, or

occupation" and whether "the principal is engaged in the work at the time of the alleged accident." *Id.* at 938-939.

The Fifth Circuit has determined that as a matter of state law the standards announced in *Berry* do not apply to cases in which the principal is a governmental entity. As the court explained in *Hebert* v. *United States*, 860 F.2d at 608, *Berry* "does not modify the rule of [*Klohn*] or [*Thomas*], which analyze the statutory employer status of government entities." The court of appeals adhered to that understanding of Louisiana law in this case.[2]

In a recent amendment to Louisiana's workers' compensation law, the Louisiana legislature has overruled *Berry* and effectively restored a single test governing the availability of the statutory employer defense to all employers. As amended, the workers' compensation statute now provides, with respect to cases arising after January 1, 1990 (La. Rev. Stat. Ann. § 23:1061 (West Supp. 1990)):

> The fact that work is specialized or nonspecialized, is extraordinary construction or simple maintenance, is work that is usually done by contract or by the principal's direct employee, or is routine or unpredictable, shall not prevent the work undertaken by the principal from being considered part of the principal's trade, business, or occupation, regardless of whether

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[2] As petitioners appear to acknowledge, the correctness of the Fifth Circuit's construction of state law presents no question calling for this Court's review. See *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to * * * regional courts of appeals in matters that involve the construction of state law."); *Frisby* v. *Schultz*, 487 U.S. 474, 482 (1988) ("Following our normal practice, 'we defer to the construction of a state statute given it by the lower federal courts . . . to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States.' ").

> the principal has the equipment or manpower capable of performing the work.

This new provision is not applicable to petitioners' claim, which arose prior to the amendment's January 1, 1990, effective date. Nevertheless, this modification of Louisiana's workers' compensation scheme deprives the question presented by the petition of any prospective importance.

2. The Federal Tort Claims Act permits suit against the United States for injuries caused by the negligence of federal employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). See 28 U.S.C. 2674 ("United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances"). In several decisions, this Court has made clear that these provisions preclude the federal government from arguing that it is not liable for "uniquely governmental" activities not performed by private parties and from invoking governmental immunities conferred by States on state and local governmental entities. *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 318-319 (1957); *Indian Towing Co* v. *United States*, 350 U.S. 61, 64-68 (1955); *United States* v. *Muniz*, 374 U.S. 150, 159, 164 (1963). In general, "the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred." *Rayonier, Inc.* v. *United States*, 352 U.S. at 319. See *Raymer* v. *United States*, 660 F.2d 1136, 1140-1142 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982); *Ewell* v. *United States*, 776 F.2d 246, 248-249 (10th Cir. 1985). See generally 1 L. Jayson, *Handling Federal Tort Claims* §§ 217.01-217.03 (1989 & Supp. 1990).

Nevertheless, the courts of appeals have sometimes referred to state law rules applicable to state governmental entities to determine the extent of the United States' liability under the FTCA. In *Louie* v. *United States*, 776 F.2d 819, 825 (1985), for instance, the Ninth Circuit concluded that the federal government's liability for an allegedly negligent failure by military police to restrain an intoxicated serviceman "rests properly on an examination of the liability of the state or a municipality under like circumstances." See *Crider* v. *United States*, 885 F.2d 294, 296 (5th Cir., 1989), cert. denied, 110 S. Ct. 2561 (1990) (following *Louie*); *Doggett* v. *United States*, 858 F.2d 555, 561 (9th Cir. 1988) (where "unique governmental functions" are involved, court seeks "to determine what liability state law attaches to * * * analogous entities subject to its jurisdiction").[3] The rationale of these decisions appears to be that when a State has exposed governmental entities to suit, a court may properly refer to laws defining the extent of their liabilities for the purpose of determining the scope of the United States' FTCA liability.

In our view, this is not an appropriate case in which to consider the question of when, if ever, a federal court may refer to state-law rules applicable to governmental entities in determining the extent of the United States' liability under the FTCA. Unlike *Indian Towing, Rayonier*, and *Muniz*, this is not a case in which the federal government is relying on the absence of equivalent private activity or invoking immunity granted by a State to its governmental entities—limitations on liability that, this Court has determined, Congress meant to relinquish in the Federal Tort Claims Act. Rather, as the Fifth Circuit has read Louisiana

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[3] See generally 1 L. Jayson, *supra*, § 217.02 (collecting cases in which courts have referred to standards governing municipal liability to determine federal government's liability under the FTCA).

law, Louisiana's workers' compensation scheme drew a distinction (from the time of the *Berry* decision until the recent amendment of the statute) between public and private entities with respect to injuries to employees of contractors. Such a distinction could rationally be based on intrinsic differences between the contracting activities of governmental and private entities or on policy considerations regarding the relative merits of the workers' compensation remedy and tort liability in the private and public sectors. The application of the Federal Tort Claims Act in that kind of situation presents a novel question. We are unaware of any decisions by courts outside the Fifth Circuit addressing the same or a comparable issue.[4] Moreover, as noted above, Louisiana's recent amendment to its workers' compensation law has mooted the issue as to claims arising after January 1, 1990. Under these circumstances, further review is not warranted.

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[4] None of the cases cited in the petition (Pet. 11-12) involved a situation in which the court isolated separate rules for private and governmental entities and chose to apply the latter in determining the United States' liability under the FTCA. Rather, those cases stand for the unexceptional principle that issues of liability and scope of employment must be resolved by reference to state law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1990

U.S. GOVERNMENT PRINTING OFFICE: 1990—262 203/20022